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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 546.

CITY OF MERIDIAN,
Defendant-Appellant,

vs.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, *Plaintiff-Appellee.*

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF APPELLEE IN OPPOSITION TO MOTION OF APPELLANT TO REVERSE AND REMAND FOR DETERMINATION BY THREE-JUDGE DISTRICT COURT AND TO BRIEF AMICI CURIAE.

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I.

Appellant has filed a motion to reverse and remand the case for determination by a three-judge district court. The motion is based on the false premise that this case involves the granting of an injunction restraining the enforce-

ment, operation or execution of a State statute, and that under 28 U.S.C., Section 2281, such an injunction cannot be granted unless the application is heard and determined by a district court of three judges.

We submit that appellant's motion is not authorized by the Rules of this Court. Further, and in any event, an examination of the statute invoked by appellant will readily reveal that there is no merit to the motion.

28 U.S.C., Section 2281, provides in substance that an interlocutory or permanent injunction restraining the enforcement, operation or execution of a State statute shall not be granted by any district court or judge upon the ground of unconstitutionality unless the application is heard and determined by a district court of three judges organized under 28 U.S.C., Section 2284.

The short answer to appellant's motion is that in the present case, no injunction whatsoever, either interlocutory or permanent, was sought by appellee or granted by the Court. No order whatsoever has been issued restraining the action of any officer of the State, or restraining the enforcement, operation or execution of a State statute.

An examination of Section 2281, and forerunner statutes, clearly reveals that the requirement of a three-judge court applies only where an application for an injunction is made and pressed to a hearing.

The fact that the complaint presents a case in which an injunction might have been applied for is immaterial. Cf. *Stratton* v. *St. Louis Southwestern Railway Co.*, 282 U.S. 10, 15, 75 L. Ed. 135, 138; *Moore* v. *Fidelity & Deposit Company*, 272 U.S. 317, 320, 71 L. Ed. 273, 278; *Smith* v. *Wilson*, 273 U.S. 388, 391, 71 L. Ed. 699, 700.

While the *Stratton, Moore* and *Smith* cases dealt primarily with interlocutory injunctions, as a matter of logic and principle, the reasoning therein likewise applies to permanent injunctions.

The plaintiff has an election. If no injunction whatsoever is sought or granted, the statutory requirement of a three-judge district court does not apply.

A distinctive characteristic of a declaratory judgment is that the declaration of rights stands by itself, and no executory or coercive process follows as of course. In other words, a declaratory judgment does not necessarily involve executory or coercive relief. A prayer for relief by injunction is not a prerequisite to the exercise of judicial power. *Nashville, Chattanooga & St. Louis Railway* v. *Wallace*, 288 U.S. 249, 263, 77 L. Ed. 730, 735, 736; *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 241, 81 L. Ed. 617, 622.

Thus, it is not necessary to the exercise of the judicial power in a declaratory judgment proceeding that an injunction be sought. If the plaintiff, as was the plaintiff here, is content with a mere declaration of his rights as provided by the statute (28 U.S.C., Sec. 2201), he is not required to seek a coercive judgment or injunction. *Stephenson* v. *Equitable Life Insurance Society*, (C.A. 4th, 1937) 92 F. 2d 406, 409. Cf. *Gully* v. *Interstate Natural Gas Co.*, (C.A. 5, 1936) 82 F. 2d 145, 149, Certiorari denied 298 U.S. 688, 80 L. Ed. 1407, 56 S. Ct. 958; *Mississippi Power and Light Company* v. *City of Jackson*, (C.A. 5, 1941) 116 F. 2d 924, 926, Certiorari denied 312 U.S. 698, 85 L. Ed. 1133, 61 S. Ct. 741.

The foregoing conclusions are further supported by the established rule that Section 2281 is to be strictly construed as a technical enactment and is not to be extended

to cases beyond its scope. *Beal* v. *Holcombe*, (C.A. 5th, 1951) 193 F. 2d 384, 388; *Phillips* v. *U. S.*, 312 U.S. 246, 250, 61 S. Ct. 480, 483, 85 L. Ed. 800, 804.

Rule 54 (c), Rules of Civil Procedure, has no application here. That rule merely provides that a final judgment shall grant the relief "to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." In the first place, in the present case, an injunction was not sought and, in any event, could not have been granted by a single-judge district court; therefore, it cannot be said that plaintiff was "entitled" to such relief. Secondly, the rule does not include relief as to a matter not made out in the pleadings or proof, and relief which a party does not desire will not be forced upon him. *Mercury Oil Refining Co.* v. *Oil Workers International Union, CIO*, (C.A. 10, 1951) 187 F. 2d 980, 983.

The case of *Federal Housing Administration* v. *The Darlington*, 3 L. Ed. 2d 132, 79 S. Ct. 141, and 352 U.S. 977, 1 L. Ed. 2d 363, 77 S. Ct. 381, is not pertinent here. Appellant omits to point out that in that case the plaintiff not only sought a declaratory judgment but also specifically sought an injunction. See *The Darlington, Inc.*, v. *Federal Housing Administration*, 134 F. Supp. 337, 338, and 154 F. Supp. 411.

The controlling fact in the present case is that 28 U.S.C., Section 2281, applies only where an interlocutory or permanent injunction restraining the enforcement, operation or execution of a State statute by restraining the action of any officer of such State is sought and granted. No injunction whatsoever was sought or granted in the present case, and no officer of the State was made a party or restrained or sought to be restrained by any injunction.

WHEREFORE, appellee respectfully submits that the motion should be denied.

II.

In an *amici curiae* brief filed after the expiration of the time for filing briefs on the jurisdictional question, four Mississippi municipalities contend that it would be appropriate for this Court to forego an orderly disposition of this appeal because of a suit filed in the name of the City of Gulfport, Mississippi, against appellee in the State court on January 12, 1959 (see Appendix), some two and one-half years after the commencement of the present suit.*

Under the circumstances, it is too obvious for doubt that this belated suit was brought in an attempt to afford some basis for a point not raised or urged upon this Court in appellant's Jurisdictional Statement or in either of the courts below.

We recognize that, under certain circumstances, and as a matter of comity, a Federal court may stay an action involving a State statute in order to permit a preliminary construction of the statute by a State court, where the statute is suscepitble of a construction which would avoid constitutional invalidity.

We submit, however, that the discretionary rule as to stay of proceedings pending a preliminary construction by a State court does not apply in a situation where, as is the case here, the construction and applicability of the State statute is not controverted by either party.

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*The suit filed by the City of Gulfport in the Chancery Court of Harrison County, Mississippi (No. 40,667), has been removed to the United States District Court for the Southern Division on the grounds of diversity of citizenship and existence of the requisite amount in controversy.

In the present case there is no dispute as to the construction of the State statute (Sec. 5e, Chapter 372, Miss. Laws of 1956), which is under attack. There is not involved a construction or determination of the applicability of the State statute. Indeed, appellant has asserted throughout the case (including its brief in the Court of Appeals, page 88) that there is no question as to the meaning and applicability of the State statute; both courts below have treated the statute as applicable; and this construction has been accepted by both parties.

Remission to the State court would result in substantial delay and expense and would serve no useful purpose.

Under such circumstances, the rule as to stay of proceedings should not be applied. *City of Chicago* v. *Atchison, Topeka and Santa Fe Railway Co.*, 357 U.S. 77, 84, 2 L. Ed. 2d 1174, 1180, 78 S. Ct. 1063.

Meredith v. *City of Winterhaven*, 320 U.S. 228, 88 L. Ed. 9, 64 S. Ct. 7, cited by *amici* does not support their position. In that case the Court did exercise its jurisdiction. The *Pullman Company* and *Fieldcrest Dairy* cases, cited in the quotation by appellant from the *Winterhaven* case, both involved the necessity of a preliminary State Court determination of the meaning of a State law. The *Magnolia Petroleum* case therein cited involved solely a question of state property law, although Federal jurisdiction arose under the Bankruptcy Act. See *Propper* v. *Clark*, 337 U.S. 472, 489, 93 L. Ed. 1480, 1494, 1495.

Mississippi has no declaratory judgment procedure whereby appellee can obtain an uthoritative judicial declaration as to its rights under the State grant here involved. For such a case, the Federal Declaratory Judgment Act is made to order. Appellee should not be denied the relief afforded by that statute especially where, as

here, the District Court's jurisdiction was invoked on the grounds of diversity of citizenship and the requisite jurisdictional amount.

We submit that there is neither logic, equity nor justice in permitting a litigant, after two and a half years of litigation in the Federal Courts, involving the constitutionality of a State statute, *under both the Federal and State Constitutions*, suddenly to decide that he would prefer to have the matter first decided by a State Court. The mischievous results that would flow from the adoption of such a rule are as real as they are obvious.

CONCLUSION.

Appellee respectfully submits that the appeal should be dismissed, or in the alternative, that the case should be affirmed.

Respectfully submitted,

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BUTLER, SNOW, O'MARA, STEVENS & CANNADA,
Jackson, Mississippi,
Of Counsel.

CERTIFICATE OF SERVICE.

I, Charles B. Snow, attorney of record for appellee, hereby certify that I have this day mailed to Honorable Thomas Y. Minniece and Honorable Lester E. Wills, attorneys for appellant, both of Meridian, Mississippi, a true and correct copy of the above brief. I further certify that a true and correct copy of the above brief has been mailed to Honorable Charles R. Galloway, Gulfport, Mississippi, Honorable Thomas J. Wiltz, Biloxi, Mississippi, Honorable Louis Alford, McComb, Mississippi, and Honorable Tally D. Riddell, Quitman, Mississippi, attorneys for *amici curiae*.

This the ..... day of ....., 1959.

.....

CHARLES B. SNOW.

APPENDIX

STATE OF MISSISSIPPI

In the Chancery Court of Harrison County

I, C. J. Darby, Clerk of the Chancery Court of Harrison County, Mississippi, do hereby certify that the said suit styled, CITY OF GULFPORT, A MUNICIPAL CORPORATION, VERSUS SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY and numbered 40667 on the general dockets of the Chancery Court of Harrison County, Mississippi, was filed on the 12th day of January, 1959, and that it had not been previously filed;

I do hereby further certify that I am the official custodian of all records and papers of said Chancery Court of Harrison County, Mississippi;

AND I FURTHER CERTIFY that said Chancery Court is a Court of Record with an official seal, and that I, as Clerk of said Chancery Court, am the custodian of the records and of the seal of said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this said court, at the CITY OF GULFPORT, on this 19th day of January, in the year of our Lord, one thousand nine hundred and fifty nine.

/s/ C. J. Darby,

(Seal)

Clerk of the Chancery Court of Harrison County, Mississippi.

THE STATE OF MISSISSIPPI

I, William G. Hewes, sole presiding Chancellor of the Eighth Chancery Court District of the State of Mississippi (said District including the County of Harrison) do hereby certify that C. J. DARBY, whose genuine signature appears to the annexed and foregoing attestation, is now, and was at the date thereof, the clerk of the Chancery Court of Harrison County, in said State, duly elected and qualified, and that his said attestation is in due form.

Witness my signature, this the 19th day of January, A. D. 1959.

/s/ William G. Hewes,
Chancellor.

THE STATE OF MISSISSIPPI
Harrison County

I, the undersigned Clerk of the Chancery Court of the county of Harrison in said State (said Court being a court of record, and having an official seal), do hereby certify that William G. Hewes, whose genuine signature appears to the annexed and foregoing attestation, is now, and was at the date thereof, the sole presiding Chancellor of the Eighth Chancery Court District of said State, which said District includes the said county of Harrison, and that said William G. Hewes, as aforesaid, is now, and was at the date of said attestation, duly commissioned and qualified.

Given under my hand and seal of office, at Gulfport, Mississippi, this the 19th day of January, A. D. 1959.

/s/ C. J. Darby,
Clerk.

(Seal)